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Report of the Secretary-General on technical assistance provided to the African Union Commission and the Transitional Government of National Unity for the implementation of chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan

I. Introduction

1. The present report is submitted pursuant to Security Council resolution 2241 (2015), in which the Council requested me to make available technical assistance for the implementation of chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan, including in setting up the Hybrid Court for South Sudan as envisaged in the Agreement, to the African Union Commission and the Transitional Government of National Unity, in consultation with them and consistent with article 1.5 of chapter V of the Agreement, and with regard to the establishment of the Commission for Truth, Reconciliation and Healing.

2. In the same resolution, the Council requested that I report to it within six months of the date of adoption of the resolution on the technical assistance provided and invited the African Union to share information on progress made to inform my report. The Council further expressed its intention at that time to assess the work that had been done towards establishing the Hybrid Court for South Sudan. I recall that the Council reiterated these requests in its resolution 2252 (2015).

II. Hybrid Court for South Sudan

3. Since December 2013, there has been a political, security and humanitarian crisis and subsequent violence in South Sudan, with serious violations of international humanitarian law and human rights having been committed. The crimes perpetrated include extrajudicial killings, ethnically targeted violence, rape and other forms of sexual and gender-based violence, the recruitment and use of children, enforced disappearances, arbitrary arrests and detentions, violence aimed at spreading terror among the civilian population and attacks on schools, places of worship, hospitals, United Nations and associated peacekeeping personnel and humanitarian staff and assets. Calls for accountability have been made in numerous forums, including the Security Council, the Human Rights Council and the African Union Peace and Security Council, and by civil society.

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4. The parties to the Agreement agreed that a hybrid court for South Sudan should be established to assist in ensuring accountability. The general framework for the Hybrid Court is provided in chapter V of the Agreement, on transitional justice, accountability, reconciliation and healing. Specifically, it is stated in article 3 of chapter V that the Hybrid Court shall be an independent hybrid judicial court and that it shall be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 to the end of the transitional period. Also set out in article 3 are broad guidelines for the jurisdiction, mandate and supremacy of the Hybrid Court, the personnel and appointment procedures, the rights of victims and witnesses, criminal responsibility and penalties.

III. Commission for Truth, Reconciliation and Healing

5. In the Agreement, the Commission for Truth, Reconciliation and Healing is mandated to inquire into all aspects of human rights violations and abuses, breaches of the rule of law and excessive abuses of power committed against all persons in South Sudan by State and non-State actors and/or their agents and allies. It is stated that the Commission shall investigate, document and report on the course and cause of conflict and recommend processes for victims to receive reparation and compensation. In accordance with the Agreement, the implementing legislation shall outline mechanisms and methods for enabling the Commission to discharge its duties and responsibilities. The Ministry of Justice and Constitutional Affairs of the Transitional Government of National Unity is tasked with conducting public consultations for a period beginning not less than one month before the establishment of the Commission.

IV. Progress made by the African Union[1]

6. The African Union Commission is responsible, under article 3 of chapter V of the Agreement and the communiqué of the African Union Peace and Security Council of 26 September 2015, for providing broad guidelines relating to the location of the Hybrid Court for South Sudan, its infrastructure, funding mechanisms and enforcement mechanism, the applicable jurisprudence, number and composition of judges, the privileges and immunities of Court personnel and any other related matters.

7. On 2 November 2015, the African Union held a high-level ad hoc workshop on the implementation of the Agreement, with the participation of members of the African Union High-level Ad Hoc Committee for South Sudan, member States of the Intergovernmental Authority on Development (IGAD) and "IGAD-plus" representatives.

8. The outcomes of the workshop included the following recommendations to the African Union Commission in relation to the establishment of the Hybrid Court for South Sudan: (a) prepare the African Union position on the elements required for

[1] The information in the present section was provided by the Office of the Legal Counsel of the African Union Commission.

the establishment of the Hybrid Court in line with the provisions of the Agreement; (b) on the basis of the African Union position, engage the United Nations and the South Sudanese parties as soon as the Transitional Government of National Unity had been established; (c) mobilize resources for the Hybrid Court and the Commission on Truth, Reconciliation and Healing, as appropriate; and (d) constitute and convene a technical working group to prepare and provide advice on the above-mentioned tasks.

9. In its communiqué of 29 January 2016, the African Union Peace and Security Council called upon the African Union Commission to urgently implement the outcomes of the workshop. The Commission has mandated the Office of the Legal Counsel to be the central department of the Commission on international criminal justice issues to coordinate the process towards the establishment of the Hybrid Court.

10. The African Union Commission convened an interdepartmental meeting on 24 March 2016 on the establishment of the Hybrid Court, which was chaired by the Legal Counsel of the African Union Commission. The offer of United Nations assistance was welcomed during that meeting and the modalities for such assistance, including the deployment of personnel, will now be developed.

V. United Nations assistance for setting up the Hybrid Court for South Sudan

11. This is the first time the Secretariat has been tasked with providing technical assistance to a regional organization for the establishment of a hybrid tribunal. The United Nations has a wealth of expertise in the establishment and operation of international and United Nations-assisted criminal courts and tribunals. In the present context, the Secretariat's role will be to convey that expertise to a regional partner, which will play the leading role. It must also be recalled that there are parallel efforts to implement other elements of the Agreement, which could have an impact on the establishment of the Hybrid Court.

12. Following the adoption by the Security Council of its resolution 2241 (2015), an interdepartmental working group convened to discuss the provision of technical assistance to the African Union Commission and the Transitional Government of National Unity for the establishment of the Hybrid Court. The working group comprised the Office of Legal Affairs, the Department of Peacekeeping Operations, the United Nations Office to the African Union, the Office of the United Nations High Commissioner for Human Rights, the Office of the Special Adviser on the Prevention of Genocide, UNDP and the Peacebuilding Support Office. In keeping with its primary responsibility on matters of international criminal accountability within the Secretariat, the Office of Legal Affairs initiated contact with the Office of the Legal Counsel of the African Union Commission.

13. Following the initial contact, on 15 January 2016, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel sent a letter to the Legal Counsel of the African Union Commission extending the United Nations offer of technical assistance contemplated by the Security Council in its resolutions 2241 (2015) and 2252 (2015). The Legal Counsel of the African Union Commission has welcomed the

offer of assistance and expressed willingness to collaborate with the Office of Legal Affairs of the Secretariat.

14. There have since been exchanges between the two offices to identify the concrete needs of the African Union Commission with regard to the establishment of the Hybrid Court. In addition, the Office of Legal Affairs has shared information about the lessons learned from past experiences in the establishment and operation of international and hybrid criminal tribunals. The information shared thus far covers key practical issues that will have to be addressed in preparation for the establishment of the Hybrid Court, including the legal basis for the establishment of an international tribunal; the role of technical assessment missions; issues of cost and funding; selection of judges and composition of the bench; defence counsel; location; the contribution to building national judicial capacity; and outreach. The discussions between the two offices on these practical issues are ongoing.

15. While the precise nature and timing of the technical assistance to be provided will depend on the African Union position on the Hybrid Court and the views of the future Transitional Government of National Unity, the Office of Legal Affairs is prepared to work closely with the Office of the Legal Counsel of the African Union Commission to produce specific and concrete results. If requested, the Office of Legal Affairs would, among other things, assist in the drafting of legal instruments for the establishment and operation of the Hybrid Court.

16. The preparation of the constitutive legal instruments may entail making recommendations on substantive legal issues, such as the legal basis for the establishment of the Hybrid Court, the personal jurisdiction of the Hybrid Court (since subject matter and temporal jurisdiction are already set forth in the Agreement) and the non-applicability of any amnesties and penalties, including the non-imposition of the death penalty. Special attention will be paid to measures relating to the governance of the Hybrid Court.

17. Suggestions concerning practical arrangements for the operation of the Hybrid Court will also have to be put forward. Drawing from the experience of other criminal tribunals, practical arrangements would encompass the organizational structure of the Hybrid Court, its funding mechanism, its location and premises, the commencement of its functioning and measures for the protection of witnesses, the participation of victims and the enforcement of sentences. In addition, practical arrangements would encompass recommendations for any anticipated support to and engagement with the Hybrid Court and other transitional justice mechanisms of the United Nations Mission in South Sudan (UNMISS), with due consideration given to the resources required for the Mission to take forward ongoing mandated tasks.

VI. United Nations assistance for the implementation of other transitional justice measures envisaged in the Agreement

18. With regard to the other transitional justice measures referred to in chapter V of the Agreement, it is important that the necessary preconditions for the establishment of transitional justice mechanisms be in place, including a complete cessation of hostilities; security; a high level of political commitment; and the necessary resources. Comprehensive, meaningful and inclusive consultations with all key stakeholders are advisable.

19. To pave the way for such an independent and inclusive consultation process, UNMISS and UNDP have already engaged different stakeholders, including civil society and the South Sudan Peace Commission, in a dialogue intended to stimulate discussion on the framework for the implementation of chapter V of the Agreement. Consequently, a conference on transitional justice was held in Juba in November 2015, with a follow-up session held in Nairobi in February 2016. The conference in Juba was organized jointly by the South Sudan Law Society and UNDP. Participants included the Ministry of Justice of South Sudan, civil society, the judiciary of South Sudan, the South Sudan Peace Commission, representatives from the South Sudan Council of Churches and national and international transitional justice experts. The conference resulted in concrete conclusions and recommendations with regard to the establishment, objectives, mandate and selection of commissioners and personnel of the Commission on Truth, Reconciliation and Healing and the Compensation and Reparation Authority, as well as the relationship between the two entities. Seven draft principles were developed to serve as a common reference for the development of a road map towards a comprehensive programme for transitional justice in South Sudan.

20. UNDP has provided the Ministry of Justice with technical advice on the key options to be considered in establishing a truth commission and in harnessing traditional mechanisms for reconciliation. UNMISS is considering engagement with entities tasked with the promotion of peace and reconciliation at the national and subnational levels, which are likely to continue to exist. Under the umbrella of the Commission on Truth, Reconciliation and Healing, these stakeholders can continue to work in collaboration for peace and reconciliation.

21. UNDP is providing support to the recently formed Transitional Justice Working Group, which is composed of several civil society organizations. The Working Group will help to coordinate the activities of civil society actors engaged in transitional justice in South Sudan so that they can play a crucial role in representing citizens, supporting the peace agreement and providing an interface between transitional justice stakeholders and official transitional justice processes in South Sudan.

22. On 17 and 18 February 2016, a meeting of the Transitional Justice Working Group was organized, with support from UNDP, through its project on access to justice and the rule of law, and external partners. The elements of a strategy for engagement in the transitional justice process have been developed.

23. On 22 February 2016, UNMISS shared its legal analysis of the proposed Penal Code Amendment Bill 2016 with the Chair of the Legislation and Justice Committee of the Transitional National Legislative Assembly and other officials to help to ensure that all international crimes are codified in the national legal framework. The proposed bill would ensure that national courts have the necessary legislation and jurisdiction in place to enable the prosecution and adjudication of international crimes, including war crimes, genocide and crimes against humanity.

VII. Observations

24. I stand ready to provide technical assistance for the establishment of the Hybrid Court for South Sudan, in accordance with Security Council resolutions 2241 (2015) and 2252 (2015). My ability to provide such assistance will necessarily

depend on the progress made in the implementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan and by the African Union Commission in its efforts to establish the Hybrid Court. In that regard, I wish to reiterate the Secretariat's long-standing advice that the funding of international criminal tribunals requires a sustainable mechanism. It should also be noted that the work of the African Union Commission may not be able to advance further in the absence of a fully-constituted and functional Transitional Government of National Unity. The establishment of the Transitional Government and its willingness to support and cooperate with regional and international organizations are therefore critical.

25. In several reports, including the report of the Office of the United Nations High Commissioner for Human Rights to the Human Rights Council of 10 March 2016, it has been found that there are reasonable grounds to believe that gross violations of international human rights law, human rights abuses, serious violations of international humanitarian law and crimes under international law have been committed in South Sudan by government forces and affiliated militias, as well as opposition forces. I share the grave concern of the Security Council about these alleged crimes, which, as the Council has noted, threaten the peace, security and stability of South Sudan. There is an increasingly urgent need to end impunity in South Sudan and bring to justice all perpetrators of such crimes. Accountability, reconciliation and healing are essential to ensuring sustainable peace. I therefore remain fully committed to continuing to provide technical assistance to the African Union Commission to ensure that the Hybrid Court for South Sudan is established as quickly as possible.